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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 487

LEVER BROTHERS COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 565, MISC.

LEVER BROTHERS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

MOTION OF THE UNITED STATES TO DISMISS APPEAL IN NO. 487

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR CERTIORARI IN NO. 565, MISC.

In the two captioned proceedings, Lever Brothers is seeking by alternative means to obtain review of

the same two discovery orders of the district court, one quashing a subpoena *duces tecum* and the other denying a motion to compel witnesses to answer questions propounded at a deposition upon oral examination. Pursuant to Rule 16, paragraph 1(a) of the Revised Rules of this Court, the United States moves that the appeal in No. 487 be dismissed. In No. 565, Misc., the United States files this brief in opposition to petitioner's motion for leave to file a petition for writ of common law certiorari, pursuant to Rule 31.

OPINION BELOW

The two orders of the district court, and the court's opinion letter accompanying the order quashing the subpoena are not reported. They are reproduced in the appendix to the jurisdictional statement in No. 487.

JURISDICTION

The orders of which review is sought were entered by the District Court for the Southern District of Ohio on July 13, 1962, and July 24, 1962. On August 6, 1962, Lever Brothers filed a notice of appeal to this Court, and on October 4, 1962, Lever Brothers filed its jurisdictional statement in No. 487, asserting that the jurisdiction of this Court is founded on Section 2 of the Expediting Act, 15 U.S.C. 29. Simultaneously, on October 4, 1962, Lever Brothers filed a motion for leave to file a petition for certiorari in No. 565, Misc., invoking this Court's jurisdiction to issue extraordinary writs under 28 U.S.C. 1651.

QUESTIONS PRESENTED

1. In No. 487, the question presented by this motion to dismiss is whether a pretrial order in a civil antitrust suit, limiting discovery against third persons, when entered by a district court other than the court in which the action is pending, is a "final judgment" directly appealable to this Court under Section 2 of the Expediting Act.

2. In No. 565, Misc., the question presented is, assuming that appeal will not lie, whether an extraordinary writ of common law certiorari should be issued by this Court to review the interlocutory discovery orders in this case.

STATUTES INVOLVED

Section 2 of the Expediting Act, 15 U.S.C. 29, provides in pertinent part:

> In every civil action brought in any district court of the United States under any of said Acts [including the Clayton Act, see 15 U.S.C. 28], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

28 U.S.C. 1651(a) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

The antitrust suit out of which the proceedings in the District Court for the Southern District of

Ohio arose is a civil action by the United States against Lever Brothers Company and the Monsanto Chemical Company, commenced in the Southern District of New York, on July 8, 1958. The complaint alleges that Lever Brothers' acquisition from Monsanto of all property rights in a synthetic detergent, ALL, violated Section 7 of the Clayton Act, 15 U.S.C. 18.

Since the filing of the complaint in New York, the parties have made much use of pretrial discovery under the Federal Rules of Civil Procedure. Much of this discovery was directed to Procter & Gamble Company and its officers because that company is an important competitor of Lever Brothers in the detergent field.[1]

On May 1, 1962, Lever, having served three of Procter & Gamble's employees with a notice of the taking of their deposition, obtained subpoenas from the Clerk of the United States District Court for the Southern District of Ohio to compel the attendance of the three Procter employees as witnesses, pursuant

[1] The permissible scope of discovery against Procter & Gamble Company is the subject of a reported decision by the court in which the government's action is pending, *United States* v. *Lever Brothers Company*, 193 F. Supp. 254 (S.D. N.Y.). The background of that opinion is that, after the government obtained information from Procter pursuant to written interrogatories, Lever sought to obtain it from the government and Procter thereupon moved for return of the material or an order allowing disclosure only to Lever counsel, and prohibiting disclosure to Lever. The district court held that Lever was entitled to full discovery subject to a protective order that the information should not be disclosed to Lever personnel except to the extent necessary to prepare for and assist in the trial of the case.

to Rule 45(d)(1) of the Federal Rules of Civil Procedure. In addition, a subpoena *duces tecum* was obtained directing one of the employees to bring certain records of Procter & Gamble Company with him to the deposition proceeding.

Procter & Gamble Company and the individual deponents asked the District Court for the Southern District of Ohio to quash the subpoena *duces tecum* under Rule 45(b) and to limit the scope of deposition examination under Rule 30(d). They asserted that Lever Brothers was requesting valuable and confidential trade secrets and argued that disclosure of these trade secrets to a competitor was not required by the exigencies of the defense of the antitrust suit.

Extensive affidavits and memoranda were filed by Procter and Lever regarding these motions. The United States limited itself to asserting the necessity for prompt action by the court below and reserved its right to object to the introduction at the trial of any material obtained in the discovery proceeding. On July 13, 1962, the district court granted the motion to quash the subpoena *duces tecum* and overruled the motion to limit the scope of the deposition examination. Thereafter Lever commenced oral examination of the deponents and sought to elicit substantially the same information which was contained in the documents called for in the quashed subpoena *duces tecum*. On advice of counsel, the deponents refused to answer and Lever sought an order from the District Court for the Southern District of Ohio pursuant to Rule 37(a) to compel the deponents

to answer the question propounded by Lever. On July 24, 1962, the district court denied this motion (J.S. App. 23–24).

Lever filed a notice of appeal to this Court on August 6, 1962, and filed a jurisdictional statement and a motion for leave to file a petition for certiorari on October 4, 1962. A notice of appeal to the Sixth Circuit Court of Appeals was filed August 10, 1962.[2]

ARGUMENT

The pretrial discovery orders of which review is sought are interlocutory steps in an antitrust suit now pending in the Southern District of New York, where trial has been scheduled for January 1963. Allowance of such an interlocutory appeal would interfere with the expeditious prosecution of antitrust cases and is expressly barred by the Expediting Act. Although the proceeding below took place in another district, Lever Brothers will be able to obtain review of the present issue upon appeal from the final judgment in the antitrust action. Moreover, this is not an appropriate case for interlocutory review by extraordinary writ.

A. In No. 487, the appeal should be dismissed for lack of jurisdiction in this Court.

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[2] *In the Matter of Notice of Deposition of the Procter & Gamble Company; United States of America* v. *Lever Brothers Co. & Monsanto Chemical Co.*, No. 15,140 (C.A. 6, 1962). The United States and Procter & Gamble Company have filed motions to dismiss Lever Brothers' appeal to the court of appeals. The court of appeals has not yet ruled on the pending motions and Lever Brothers has asked that decision be delayed until this Court rules on the present applications.

Section 2 of the Expediting Act, 15 U.S.C. 29, authorizes appeal to this Court only from "the final judgment" of the district court in civil antitrust cases in which the United States is complainant. As this Court stated, the purpose of this statute is "to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act". Not only are the courts of appeals bypassed, but also "Congress limited the right of review to an appeal from the decree which disposed of all matters * * * *and it precluded the possibility of an appeal to either court from an interlocutory decree.*" *United States* v. *California Canneries*, 279 U.S. 553, 558. [Emphasis added.] To the same effect are *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305, fn. 9; *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137; *National Association of Real Estate Boards* v. *United States*, 176 F. 2d 631 (C.A.D.C.).[3]

The orders below limited discovery by one of the parties to a pending antitrust suit against nonparty witnesses. Such rulings relating to pretrial discovery are typical nonappealable interlocutory orders. See 4 Moore, *Federal Practice* ¶ 26.37[1]. This Court has held that motions for an application for a subpoena *duces tecum* are part of "the general subject of the litigation" and that therefore all "orders made upon

[3] In all cases, "Finality as a condition of review is an historic characteristic of federal appellate procedure". *Cobbledick* v. *United States*, 309 U.S. 323, 324; *DiBella* v. *United States*, 369 U.S. 121, 126. But the policy is even stronger in antitrust cases under the Expediting Act. Thus, interlocutory orders in ordinary civil cases can now be made appealable by a certification; not so in cases under the Expediting Act.

such applications" are unappealable. *Cogen* v. *United States*, 278 U.S. 221, 223, 224.[4]

The fact that the instant motions were acted on by a district court other than the one in which the trial will ultimately take place does not alter their interlocutory nature. In *Alexander* v. *United States*, 201 U.S. 117, this Court held nonappealable the denial of a motion to quash a subpoena in a government antitrust case, even though the order was entered by a court other than that in which the trial of the case would eventually occur.[5] In many cases, particularly in the antitrust field, the parties often take depositions in other districts. If each such order were appealable, the Congressional policy against piecemeal appeals would be easily flouted.

Clearly, Lever Brothers will be able to obtain appellate review of the present issue upon appeal from an adverse final judgment in the antitrust action in the Southern District of New York. As a party to

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[4] See also *Cobbledick* v. *United States*, 309 U.S. 323 (denial of motion to quash grand jury subpoena not appealable); *Alexander* v. *United States*, 201 U.S. 117 (denial of motion to quash pretrial subpoena in antitrust case not appealable). *United States* v. *Tinkoff*, 153 F. 2d 106 (C.A. 7), certiorari denied, 329 U.S. 740 (denial of application for subpoena not appealable).

[5] Accord, *Palmer* v. *Fisher*, 228 F. 2d 603 (C.A. 7), certiorari denied, 351 U.S. 965 (grant of motion to quash subpoena); *Robinson* v. *Bankers Life & Casualty Co.*, 226 F. 2d 834 (C.A. 6), (denial of motion); *National Nut Co. of California* v. *Kelling Nut Co.*, 134 F. 2d 532 (C.A. 7) (denial of motion). The First Circuit recently declined to follow *Palmer* v. *Fisher*, on grounds not pertinent in this case, *infra*, pp. 10–11.

a government antitrust suit, Lever may take advantage of the nationwide subpoena authority in 15 U.S.C. 32 and obtain subpoenas from the trial court in New York compelling the attendance at trial of the Procter & Gamble Co. employees in Ohio here involved, seeking to compel testimony as to the same matters.[6] In addition, Lever is not foreclosed from attempting to obtain the same information in New York, by use of written interrogatories to the company under Rule 31. This was the procedure heretofore utilized by the government, n. 1, *supra*. In the circumstances, there is no basis for an appeal at this interlocutory stage. Cf. *DiBella* v. *United States*, 369 U.S. 121, 132–133.[7]

None of the cases cited by Lever Brothers (Pet. 5) in support of the Court's jurisdiction on appeal is

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[6] Lever counsel has already indicated, in the course of pretrial conferences in the Southern District of New York, that it will apply to that court for trial subpoenas to the Procter witnesses, if it is unsuccessful in the present proceeding. Transcript of pretrial conference, September 16, 1962, pp. 25-26. In that connection, Judge Dawson in New York indicated that Lever might be able to obtain sufficient economic evidence for its defense of the case, without the specific statistical data sought from Procter & Gamble (*id.* at 26).

[7] In *DiBella* v. *United States*, 369 U.S. at 132–133, this Court held that an order granting or denying a pre-indictment motion to suppress evidence in a criminal case was interlocutory and not appealable, even when it is made in a district other than that in which the trial will be held. The Court noted that such a pretrial order may be "tentative", and appeal would transgress the policy against "piecemeal adjudication" (p. 132).

apposite. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–547, the Court held appealable a claim "separable from, and collateral to, the rights asserted in the action * * * which is not an ingredient of the cause of action and does not require consideration with it."[7] Never has it been suggested, however, that pretrial discovery orders can be "independent" of the merits; such orders are clearly an aspect of "the general subject of the litigation" (*Cogen* v. *United States*, 278 U.S. at 223).[8] In *Horizons Titanium Corp.* v. *Norton Co.*, 290 F. 2d 421 (C.A. 1), the First Circuit took jurisdiction of an appeal from an order quashing subpoenas secured in the Massachusetts district court by a party to an action pending in the District of Columbia, on the ground that the issue could not be brought into the main case for eventual review. However that may be in ordinary civil litigation, we have already shown that, in this case, Lever Brothers can assure such review.[9]

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[7] If the present orders were deemed "separable" decrees in the main case, then, as we said in our motion to dismiss before the Court of Appeals for the Sixth Circuit (n. 2, *supra*), the appeal would be here and not to that court.

[8] Another case cited by Lever, *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688–689, was an application of *Cohen* to uphold review of an order vacating an attachment of a vessel. Once the vessel departed, the attachment could not be restored, and, therefore, the provisional relief was ruled severable and appealable. Similarly, the Seventh Circuit in *Palmer* v. *Fisher*, 228 F. 2d 603, 607, *supra*, fn. 5, although holding nonappealable an order quashing a subpoena, did review an order directing physical destruction of a deposition.

[9] Lever's reliance on *Horizons* is inconsistent with its invocation of this Court's jurisdiction. *Horizons* suggests that the discovery proceeding in a court other than the trial district may

B. In No. 565, Misc., petitioner's motion for leave to file petition for writ of certiorari under 28 U.S.C. 1651 should be denied.

The common law writ of certiorari sought by petitioner has historically been used to enforce jurisdictional limitations upon inferior courts; it "may not be used as a substitute for an authorized appeal", nor may it be used as a basis for interlocutory appeal "in the face of the plain indication of the legislative purpose to avoid piecemeal reviews". *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 202–203; *United States* v. *Beatty*, 232 U.S. 463, 467;

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be considered "plenary", when decided adverse to the party. If so, it would not be a civil antitrust action in which the United States is complainant for Expediting Act purposes, and appeal would lie only to the court of appeals. We believe that the proceedings below was clearly not plenary but an interlocutory step in the pending antitrust case.

As a rule for nonantitrust cases, *Horizons* is contrary to *Palmer* v. *Fisher*, cited *supra*, fn. 5. The First Circuit distinguished *denial* of a motion to quash a subpoena, which it agreed would not be appealable, on the ground that a witness has an alternative means of obtaining a review of an adverse ruling, by forcing a contempt proceeding. However, contrary to that court's belief that an appeal must be available sooner or later from every order in civil litigation, appeals are a matter of Congressional grace (*Cobbledick* v. *United States*, 309 U.S. 323, 325), and there may well be issues which cannot be tested by appeal, because of the requirement of finality, and for which the extraordinary writs constitute the only remedy for abuse of discretion. See 4 Moore, *Federal Practice* ¶26.37 [4], [7] discussing review by prefogative writ of discovery orders; see also *Ex parte Blaski*, 245 F. 2d 737 (C.A. 5), certiorari denied, 355 U.S. 872 (review of transfer of cases under 28 U.S.C. 1404(a)).

Roche v. *Evaporated Milk Assn.*, 319 U.S. 21, 26; see also Rule 30, Revised Rules of this Court.

The orders below are routine rulings on pretrial discovery which are not appealable; *a fortiori* there is no basis for the issuance of an extraordinary writ. Although labelled "extraordinary circumstances" by the petitioner, the issues of which it seeks review under 28 U.S.C. 1651 are (Pet. 7-9): (a) the propriety of a decision on pretrial discovery matters by a court other than the trial court—a procedure clearly contemplated by the Federal Rules of Civil Procedure[10] and (b) the correctness of the decisions rendered.

The contrast between the factual situation here and those in the three cases which are relied upon by the petition (p. 7) strongly militates against the exercise of this Court's discretionary jurisdiction under 28 U.S.C. 1651. Thus, in *DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, the issue was

[10] Rule 45(d)(1), Federal Rules of Civil Procedure, authorizes the clerk of the district court in which a deposition is to be taken to issue subpoenas in aid of the deposition. Any issues regarding the subpoenas are determined by the court which issued them and there is no basis for Lever's suggestion that the controversy regarding the discovery orders must be turned over to the New York District Court for decision as a result of the designation of one judge of that court, "for all purposes" in this antitrust case. Furthermore, the order denying the motion to compel deponents to answer was sought by Lever Brothers in the Ohio District Court under Rule 37(a) of the Federal Rules of Civil Procedure. The rule specifies that the motion must be made "to the court in the district where the deposition is taken."

the jurisdiction of a district court to issue a preliminary injunction in a Sherman Act proceeding which had the effect of sequestering property worth many hundreds of thousands of dollars. The order concerned "a matter lying wholly outside the issues in the case; no decision of the suit on the merits can redress any injury done by the order * * *" 325 U.S. 212, 217. *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, and *Far East Conference* v. *United States*, 342 U.S. 570, presented grave questions regarding the jurisdiction of district courts in Sherman Act cases *vis-a-vis* administrative agencies who assertedly had primary jurisdiction of the issues before the court.

This case presents no issue of similar moment. Petitioner, of course, concedes that the Ohio district court had jurisdiction of the pretrial discovery proceedings but argues that supervision of "the comity owing by one court to another" requires the issuance of the extraordinary writ (Pet. 9). But the fact is that Lever Brothers may yet obtain the material sought in discovery or at trial (see p. 9, *supra*). And of course a final decision in Lever's favor on the merits of the case will render the issue now before this Court moot. An extraordinary writ under 28 U.S.C. 1651 cannot "be availed of to correct a mere error in the exercise of conceded judicial power" (*DeBeers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217). See also *Roche* v. *Evap-*

orated Milk Ass'n, supra; United States v. Beatty, supra. The issues raised by the petition for certiorari do not warrant departure from the Expediting Act's provision that appeal to this Court is authorized only from a "final judgment".

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal in No. 487 be dismissed and that the motion for leave to file a petition for certiorari in No. 565, Misc., be denied.

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